

[Plan Check Downtown v. Amguard Ins. Co, et. al.](#)

Year: 2021

Court: United States Court of Appeals for the Ninth Circuit

Case Number: 2:20-cv-06954-GW-SKx

In its brief, UP explores whether the effects of COVID-19 triggers “physical loss or damage” under a business interruption coverage policy. UP states that the most appropriate course of action is for the court to:

- a. decline to certify the “physical loss or damage” issue to state courts or endorse the district court’s physical injury analysis; and
- b. remand this case with instructions to permit re-pleading (or, alternatively, to sustain the dismissal based only on narrow policy exclusion grounds, an issue on which this brief takes no position).

UP’s reasoning is four-fold:

- I. This case presents a poor vehicle for certification of the “physical loss or damage” issue. The record on appeal lacks the factual record necessary to adequately assess the existence of “physical loss of or damage to” property such that a sufficiently helpful response could be obtained from California’s high court.
- II. If this Court were to conclude that the virus exclusion does not eliminate all coverage (rather than affirm on that alternative ground), then this case would be a strong candidate for remand with instructions to grant leave to amend to consider the physical injury issue on a full record.
- III. This federal appeal is simply not the right case to attempt to determine when a pandemic-affected property suffers physical injury for insurance purposes, because that is an issue of state law on which California courts should speak first.
- IV. If this Court does address the merits of the dismissal, it should hold that the district court erred in declining to find “physical loss of or damage to” property in the circumstances of this pandemic.

UP concludes that the court should remand with instruction to grant leave to amend.

This brief was authored pro bono by Jad Khazem, David Goodwin, and Hannah Chartoff of Covington and Burling LLP